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Pankaj Limbu v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05(M)-102–02 OF 2018
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN CHUNG JJCA
29 JULY 2019

C *Criminal Law — Offences — Murder — Whether appellant knew the act likely to cause death of the deceased — Multiple stab wounds to the chest — Intention formed at the spur of the moment*

D *Evidence — Translation — Impugning accuracy of court interpreter's translation — Whether failure to explain the evidence to the appellant in Nepali would cause a mistrial — Whether appellant understood Hindi and could follow trial proceedings — Whether issue on translation ought to be raised earlier*

E This was an appeal filed by the appellant who was convicted of murder. The appellant together with PW1 and another person known as Ramesh who were working as security guards, returned to their hostels after consuming alcohol where they stayed with a total of fifteen employees including the deceased. At
F the hostel, they were invited by a person named Yugan to enter a room at the hostel where the incident took place, when the deceased came out of the said room, the appellant grabbed the deceased trousers and asked for a cigarette which resulted in an argument. Ramesh had intervened and hits the deceased's head using a *kuali* whereupon the appellant rushed at the deceased. The
G deceased then pushed the appellant who fell down, the appellant took a knife which was nearby and stabbed the deceased in the right side of the chest. The appellant's contention was that the learned trial judge had erred in considering the evidence of PW1 because an interpreter by the name of Md Yusof bin Md Sharif, who was supposed to translate the evidence of PW1 in Nepali, did not
H use Nepali but instead instructed PW1 to use Hindi. It was submitted that (a) there was a failure of justice and the evidence of PW1 should be disregarded; and (b) the appellant had successfully raised the defence of grave and sudden provocation, self-defence and intoxication.

I **Held**, dismissing the appeal and affirming the conviction and sentence of the High Court:

(1) The then counsel for the appellant and the appellant did not complain that the appellant did not understand the evidence because it was not explained to him in Nepali and it was never an issue during the trial. The

records showed that the appellant understood Hindi and was able to follow the trial proceedings (see para 20).

(2) The appellant should not have waited until the appeal to raise this as an issue for the first time. PW1 was the first witness and if there was any complaint made, if it was true, it would have been remedied there and then instead of waiting until the appeal to raise this as an issue (see para 21).

(3) The fact that the appellant stabbed the deceased in the chest which caused the injuries which the appellant knew to be likely to cause the death of the deceased, then it was done with such intention to cause death. Such intention was formed at the spur of the moment and not necessarily be premeditated. There was no merit in the submission that it was unintentional and under the influence of alcohol (see para 28).

(4) There was no evidence of any apprehension of death or grave bodily harm, real or apparent. There was no evidence to support the appellant's defence of grave and sudden provocation (see para 31).

[Bahasa Malaysia summary

Ini merupakan rayuan yang difailkan oleh perayu yang telah disabitkan untuk bunuh. Perayu bersama-sama dengan PW1 dan seorang lagi yang dikenali sebagai Ramesh yang berkerja sebagai pengawal keselamatan, pulang ke hostel selepas minum arak, yang mana tempat mereka tinggal bersama dengan lima belas pekerja termasuk si mati. Di hostel tersebut, mereka dijemput oleh seorang bernama Yugan untuk memasukki satu bilik di hostel tersebut yang mana merupakan tempat kejadian berlaku, apabila si mati keluar daripada bilik tersebut, perayu telah memenggang seluar si mati dan meminta untuk satu rokok yang telah menyebabkan satu perbalahan. Ramesh telah campur tangan dan memukul kepala si mati menggunakan satu kuali yang mana perayu telah meluru ke si mati. Si mati kemudiannya menolak perayu yang telah jatuh, perayu telah mengambil pisau yang berada berdekatan dan menikam si mati di bahagian kanan dada. Adalah menjadi hujahan perayu bahawa hakim bicara telah terkhilaf apabila menimbangkan keterangan PW1 atas sebab jurubahas bernama Md Yusof bin Md Sharif, yang sepatutnya menafsirkan keterangan PW1 kepada bahasa Nepal, tidak menggunakan bahasa Nepal, tetapi mengarahkan PW1 untuk menggunakan bahasa Hindi. Ianya dihujahkan bahawa: (a) wujud kegagalan keadilan dan keterangan PW1 harus diketepikan; dan (b) perayu telah berjaya membangkitkan pembelaan bangkitan marah besar dan mengejut, bela diri dan mabuk.

Diputuskan, mengetepikan rayuan dan mengekalkan sabitan dan hukuman Mahkamah Tinggi:

(1) Peguam perayu pada waktu tersebut, dan perayu tidak mengadu bahawa perayu tidak memahami keterangan kerana ianya tidak diterangkan

kepadanya dalam bahasa Nepal dan ianya tidak pernah menjadi isu sewaktu perbicaraan. Rekod menunjukkan bahawa perayu memahami bahasa Hindi dan dapat mengikuti prosiding perbicaraan (lihat perenggan 20).

(2) Perayu sepatutnya tidak menunggu sehingga peringkat rayuan untuk membangkitkan isu ini untuk kali yang pertama. PW1 merupakan saksi pertama dan sekiranya apa-apa aduan dibuat, sekiranya ianya benar, ianya sepatutnya dibetulkan pada waktu itu jua dan bukannya untuk menunggu rayuan untuk membangkitkan perkara ini sebagai isu (lihat perenggan 21).

(3) Fakta yang perayu telah menikam si mati di dada yang menyebabkan kecederaan yang mana perayu tahu berkebarangkalian akan menyebabkan kematian si mati, oleh itu ianya dilakukan dengan niat untuk menyebabkan kematian. Niat tersebut dibentuk pada waktu itu dan tidak semestinya perlu untuk dirancang. Tiada merit dalam hujahan bahawa ianya dilakukan tanpa niat dan di bawah pengarah alkohol (lihat perenggan 28).

(4) Tiada keterangan yang menunjukan apa-apa kebimbangan kematian atau kecederaan badan yang serius, sebenar atau zahir. Tiada keterangan untuk menyokong pembelaan kebangkitan marah besar dan di bawah apa-apa pengaruh alkohol (lihat perenggan 28).]

Notes

For a case on impugning accuracy of court interpreter's translation, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 3317.

For cases on murder, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2079–2096.

Cases referred to

Aboys ak Saon (M) v PP [2014] 1 MLJ 710, CA (refd)
Asis bin Lako v PP [2017] 6 MLJ 483, CA (refd)
Balasundram a/l Paskaran v PP [2012] 4 MLJ 347, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)
Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2012] 8 CLJ 537, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Kumaran a/l Sappani v PP [2012] 6 MLJ 153; [2011] 2 AMR 486, FC (refd)
Mahadzir bin Yusof & Anor v PP [2011] 1 MLJ 297, CA (refd)
PP v Megat Shahrizat bin Megat Shahrur [2013] 3 MLJ 227; [2011] 8 CLJ 893, FC (refd)

PP v Mohd Nor Riza bin Mat Tahar [2011] 2 MLJ 21; [2009] 4 CLJ 691, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174; [1976] 1 LNS 159, FC (refd)

Legislation referred to

Penal Code ss 299, 300, 302, 304(b)

Appeal from: Criminal Trial No CA-45B–01–04 of 2017 (High Court, Kuantan)

Kharen Jit Kaur a/l La Chin Singh (Kharen Jit & Assoc) for the appellant.
Zaki Asyraf (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Stephen Chung JCA (delivering judgment of the court):

THE APPEAL: BACKGROUND FACTS

[1] The appellant was charged for murder of Harpreet Singh a/l Jagir Singh ('the deceased') under s 302 of the Penal Code as follows:

> Bahawa kamu pada 10 November 2016, jam lebih kurang 4.30 petang, di bilik sewa beralamat L 76, Tingkat 1, Lorong Rusa 1, Jalan Bukit Ubi, di dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, telah membunuh seorang lelaki bernama Harpreet Singh a/l Jagir Singh, No passport: H9315389, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] On 10 November 2016, the appellant together with PW1 and another known as Ramesh, all foreigners, working as security guards, went to Kuantan Parade to transfer money to their families in Nepal. The three consumed alcohol before returning to the hostel provided by their employer. Fifteen employees including the deceased stayed in the hostel.

[3] At the hostel, they were invited by a person named Yugan to enter a room (where the incident took place) at the hostel. The appellant did not enter the room but stayed outside the room. When the deceased came out of the said room the appellant grabbed the deceased's trousers and asked for a cigarette which resulted in an argument between them. The argument continued when the appellant went into the room. Ramesh intervened and hit the deceased's head using a *kuali* where upon the appellant rushed at the deceased. The deceased then pushed the appellant who fell down. The appellant took a knife which was nearby and stabbed the deceased in the right side of the chest. The appellant, Ramesh and PW1 then ran away. The appellant and PW1 were arrested on 11 November 2016 while Ramesh is still at large.

A **[4]** In his defence, the appellant contended that a quarrel had occurred when he asked for a cigarette from the deceased who then insulted the appellant, his mother and sister in Hindi. He ignored the provocation but the deceased pushed him and he fell down. The appellant contended that he only punched the deceased in the mouth and saw Ramesh hit the deceased with a *kuali*. The B appellant denied stabbing the deceased. The appellant submitted that he did not know anything about the knife and could not remember the incident due to the alcohol consumed. He said he fled with Ramesh because the deceased was pursuing them.

C **[5]** The learned judge found that the appellant failed to raise any reasonable doubt on the prosecution's case and that the prosecution had proven its case against the appellant beyond a reasonable doubt. The learned judge found the appellant guilty as charged and convicted and sentenced him in accordance D with law. This is the appellant's appeal.

THE CASE FOR THE APPELLANT

[6] Counsel for the appellant submitted that the learned trial judge had erred E in considering the evidence of PW1 because an interpreter by the name of Md Yusof bin Md Sharif, who was supposed to translate the evidence of PW1 in Nepali, did not use Nepali but instead instructed PW1 to use Hindi. It was submitted that there was a failure of justice and the evidence of PW1 should be disregarded.

F **[7]** It was submitted that the appellant had been consuming alcohol at the time and was intoxicated and that the deceased behaved aggressively and provoked the appellant by making insults against his mother and sister. It was submitted that on the facts of the case, the appellant had successfully raised the G defence of grave and sudden provocation, self-defence and intoxication and that the learned judge had erred.

[8] The appellant submitted that he did not bring the knife to the scene and H that a knife was by chance at the place where he fell. It was argued that the murder was unintentional and that he was drunk and could not recognise the deceased.

[9] It was submitted that PW1, who was allegedly with the appellant at all I times until the arrest, could not tell and identify the knife used to injure the deceased. It was submitted that PW1 had also given conflicting evidence about the wound to the chest.

[10] The discovery of the presence of DNA at the scene marked 'Male 1' and

'Male 2' had raised doubts on the prosecution's case that the appellant was responsible for the murder.

[11] The learned trial judge had erred when a maximum assessment was not made on all the evidence submitted by the prosecution's witnesses because there were inconsistencies in the prosecution's evidence. It was submitted that the evidence kept changing and if the appellant chose to keep silent, then the learned trial judge would not be able to convict the appellant.

THE CASE FOR THE PROSECUTION

[12] The prosecution submitted that PW1 who saw the appellant stabbed the deceased was a credible witness. During the trial there was no challenge to the reliability and credibility of PW1 and the failure to challenge PW1's testimony on a matter of importance was fatal to the appellant's case.

[13] In relation to the appellant's intention, it was argued that on the facts and the expert witness PW8's testimony that the stab to the chest with a sharp weapon had cut the blood vessels in the right lung, the pulmonary vein and the main blood vessel to the heart, which was the superior vena cava, had resulted in massive blood loss and the failure of the cardio vascular system which eventually resulted in death of the deceased. It was submitted that based on the use of a sharp weapon such as a knife and the stab to the chest where the vital organs were, the appellant intended to kill the deceased.

[14] On the issue of the appellant's defence that he was intoxicated at the time of the incident, the prosecution relied on the case of *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2011] 2 MLJ 21; [2009] 4 CLJ 691 to rebut the appellant's defence of intoxication.

[15] On the appellant's defence that there was a grave and sudden provocation on the part of the deceased, it was submitted that the learned judge did not err in following the judgment of the Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 to reject the defence of grave and sudden provocation.

THE COURT'S DECISION

[16] On the first ground raised by the appellant that the interpreter failed to translate and explain the evidence of PW1 in Nepali to the appellant during the trial tantamount to a failure of justice. We note that this ground was not raised nor canvassed at the High Court during the trial. This was raised for the first time on appeal.

A **[17]** On the evidence of PW5 and PW6, fifteen foreign workers, some from India and some from Nepal, including the appellant, the deceased, Ramesh and PW1, worked as security guards, mainly at a shopping mall known as Kuantan Parade except for a few who were stationed in Pekan. All of them stayed in the hostel provided by their employer. They conversed with each
B other in Hindi and Nepali.

[18] At the material time the appellant, the deceased, Ramesh and PW1 were in the hostel. When the appellant asked the deceased for a cigarette, an argument ensued and the appellant complained that the deceased made
C provocative remarks insulting his mother and sister in Hindi. Obviously the appellant understood Hindi otherwise he would not have complained (in fact at one stage during cross examination, the appellant stated that he understands Hindi (see p 273, Q & A 49, *Jld* 2B, *rekod rayuan*)).

D

[19] PW1 was an eyewitness and the first witness called for the prosecution. He gave evidence in Hindi. If the appellant did not understand or not conversant with Hindi, this should have been raised there and then and it would have been remedied. The trial judge would have dealt with it and asked
E for a another interpreter before proceeding further with the trial.

[20] Based on the notes of proceedings, the interpreter translated the evidence of PW1 from Hindi into English and Bahasa Malaysia to the court and explained the evidence of PW1 in Nepali to the appellant. The then
F counsel for the appellant and the appellant himself did not complain that the appellant did not understand the evidence because it was not explained to him in Nepali and it was never an issue during the trial. The records showed that the appellant understood Hindi and was able to follow the trial proceedings.

G **[21]** At all times the appellant was represented by counsel. His counsel did not submit that it was or became a mistrial or that there was a failure of justice because the evidence of PW1 was not explained in Nepali to the appellant. The appellant should not have waited until the appeal to raise this as an issue for the first time. PW1 was the first witness and if there was any complaint made, if it
H was true, it would have been remedied there and then instead of waiting until the appeal to raise this as an issue. We were of the view that there was no merit on this ground and no miscarriage of justice.

[22] It was another attempt to challenge the evidence of the eye-witness
I PW1 and that it should be inadmissible against the appellant. At the end of the trial, the learned judge had found that the defence failed to challenge the evidence of PW1 and PW11 (the investigating officer of the case) and accepted their evidence as credible and true. An appellate court is slow to interfere with the finding on the credibility of a witness which is primarily a matter for the

trial judge: see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. On the appeal record, there was ample evidence to justify his findings as such.

[23] On evidence, at the material time there were about seven to eight persons in the hostel including the appellant, the deceased, Ramesh and PW1. The four had been consuming alcohol. PW1 testified that the appellant then put his hand inside a pocket of the deceased's trousers asking for a cigarette and an argument ensued. PW1 tried to calm the situation but the argument started again after a few minutes. PW1 testified that Ramesh intervened in the argument and ended up quarreling with the deceased and saw Ramesh using a *kuali* to hit the head of the deceased while the appellant was shouting instructions and rushed at the deceased. He said the deceased then pushed the appellant which caused the appellant to fall down. The appellant saw a knife nearby, took it and stabbed the deceased once with the knife. The appellant, Ramesh and PW1 then ran away. PW6 testified that he collided with the three who ran out from the area.

[24] PW1's identification of the appellant was not an issue because they worked and stayed together for many months. Although PW1 ran away with the appellant and Ramesh and was arrested, there was no allegation by the appellant that PW1 was involved in the fight or that PW1 was taking sides so that his evidence became tainted and carried little weight. There was nothing to suggest that PW1 lied or was untruthful.

[25] PW8, the pathologist who performed the autopsy on the deceased, found a vertical split laceration on the right side of the head. This commensurate being hit with a hard object or a *kuali* which confirmed what PW1 said that Ramesh used a *kuali* to hit the head of the deceased. In fact, in his defence, the appellant himself said that Ramesh used a *kuali* to hit the deceased's head. PW8 found one stab wound to the upper chest slightly to the right which again confirmed the testimony of PW1 that the appellant used the knife to stab the deceased once. Therefore the learned judge was not plainly wrong in accepting the evidence of PW1 as credible and true.

[26] The appellant submitted that the presence of DNA of 'Male 1' and 'Male 2' had cast doubts on the prosecution's case. The DNA of 'Male 1' was taken from a cigarette butt recovered from the floor of room 1 and the DNA of 'Male 2' was found on a cigarette butt recovered from room 3 in the hostel. As stated, 15 foreign workers stayed in the hostel. During investigation the police took blood specimen from eight employees including from the appellant and the deceased who were present in the hostel during the incident. No blood specimen was taken from the others who were on duty and not present in the hostel at the material time. The presence of the DNA of 'Male 1' and 'Male 2'

in the hostel did not detract from the testimony of PW1 and the fact that the appellant had stabbed the deceased. There was no allegation that it was Ramesh or someone else who stabbed the deceased. There was no evidence contrary to what PW1 had testified that it was the appellant who stabbed the deceased once with the knife.

[27] The appellant then submitted that he did not bring the knife, that there was no intention to kill and it was not premeditated. It was submitted that it should be reduced to a charge under s 304(b) of the Penal Code. It was not in dispute that the appellant did not bring the knife to the scene. When the appellant got up after the deceased had pushed him during the quarrel, he saw a knife nearby. He took the knife and stabbed the deceased once in the chest. It was submitted that in stabbing the deceased once in the chest, it was not done with the intention to cause death. The evidence showed that it was a deep chest wound. The chest is that part of the body which contains the vital organs such as the heart, the lungs and the large blood vessels. If you make a deep stab wound to the chest, it will likely cause serious injuries including to the organs.

[28] PW8 had testified that a sharp weapon had pierced the right first inter-costal muscle near the sternum bone entering the right chest cavity penetrating the upper lobe of the right lung, right pulmonary vein, superior vena cava (large vein to the heart), passed below the carina of the trachea and ended at the hilum of the left lung. These led to massive internal bleeding, cardiovascular failure and fairly rapid death. Therefore it was a fatal stab wound which caused the death of the deceased. The difference between ss 299 and 300 of the Penal Code has been explained in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174; [1976] 1 LNS 159. The fact that the appellant stabbed the deceased in the chest which caused the injuries which the appellant knew to be likely to cause the death of the deceased, then it was done with such intention as to cause death. Such intention was formed at the spur of the moment and not necessarily to be premeditated: see *Public Prosecutor v Megat Shahrizat bin Megat Shahrur* [2013] 3 MLJ 227; [2011] 8 CLJ 893; *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2012] 8 CLJ 537. There was no merit in the submission that it was unintentional and under the influence of alcohol.

[29] Although the appellant contended that he was under the influence of alcohol, the learned judge ruled that the appellant was able to run away with the others which did not help his defence of intoxication. He found that the appellant was able to recall and described in detail what happened before, during and after the incident and rejected the defence of intoxication. We took note that the appellant did not testify how much alcohol he had consumed and there was no toxicology report produced on his blood-alcohol level to support his contention that he was intoxicated or that he was so intoxicated that he did

not know what he did was wrong: see *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481; *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153; [2011] 2 AMR 486. It was never put that by reason of intoxication that he was rendered temporarily insane at the time he stabbed the deceased, such that he could not have formed the intention to cause that fatal stab wound: see *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671; *Balasundram a/l Paskaran v Public Prosecutor* [2012] 4 MLJ 347. In any event, self-induced intoxication is not a defence: see *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2011] 2 MLJ 21. Therefore the learned judge was right to reject the defence of intoxication.

[30] On the defence of grave and sudden provocation, the learned judge referred to the appellant's claim that the deceased had insulted the appellant's mother and sister in Hindi. The learned judge ruled that the words complained of must be understood and that the appellant understood simple Hindi but was unable to give the actual words used which insulted his mother and sister. The alleged insults were purportedly uttered during the quarrel after the appellant grabbed the deceased's trousers and asked for a cigarette. PW1 had testified that he managed to calm them down before the argument started again when Ramesh intervened in the quarrel. There was no evidence that the words used amounted to grave and sudden provocation or that they were sufficient to deprive him of the power of self-control and that he lost control. On evidence, the appellant failed to substantiate his allegation that the deceased had insulted his mother and sister which made him lose control. In any event the alleged insults could not amount to grave and sudden provocation.

[31] On the facts, the learned judge found that the deceased did not start the fight. After Ramesh hit the deceased's head with the *kuali*, the appellant rushed at the deceased who in self-defense pushed the appellant who fell down. When the appellant got up, he saw a knife nearby. He took the knife and stabbed the deceased with it. The deceased was not armed. There were two persons against one. The appellant did not suffer any injury. There was no evidence of any apprehension of death or grave bodily harm to the appellant. It was not put and there was no evidence that there was an impending peril to the appellant's life or grave bodily harm, either real or apparent: see *Aboys ak Saon (M) v Public Prosecutor* [2014] 1 MLJ 710; *Asis bin Lako v Public Prosecutor* [2017] 6 MLJ 483. There was no evidence to support the appellant's defence of grave and sudden provocation. The non-recovery of the knife as the murder weapon was not fatal to the prosecution's case: see *Mahadzir bin Yusof & Anor v Public Prosecutor* [2011] 1 MLJ 297.

[32] At the end of the appeal, we were unanimous that there were no merits in the appeal and dismissed the appeal. We affirmed the order of conviction and sentence of the High Court.

Appeal dismissed; conviction and sentence of High Court affirmed.

Reported by Izzat Fauzan